

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,

vs.

EDWARD JEROME HARBISON

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Nos.: 154361 & 154362

DEATH PENALTY CASE

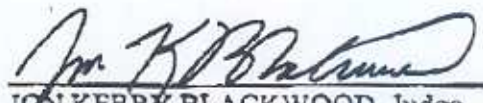
ORDER DENYING "MOTION TO RESTITUTE
PRO SE FILINGS BACK UPON COURTS DOCKET"

This matter is before the Court on Edward Jerome Harbison's *pro se* "Motion to Restitute Pro Se Filings Back Upon Courts Docket." When Mr. Harbison submitted this Motion, he was still scheduled to be executed on September 26, 2007. Since the submission of the Motion, Mr. Harbison's execution date has been re-scheduled to January 9, 2008, by the Supreme Court of Tennessee by Order dated September 25, 2007. A copy of that order, including Justice Koch's dissent from the Order, are attached hereto as Exhibit A.

In his Motion, Mr. Harbison essentially seeks an Order from this Court discharging the Office of the Post-Conviction Defender (PCD) as his court-appointed state court postconviction counsel, and allowing consideration of Mr. Harbison's previously filed *pro se* pleadings which were struck by this Court as having not been filed by the PCD. However, this Court does not have the authority to discharge the PCD as Mr. Harbison's counsel since this Court did not appoint the PCD as Mr. Harbison's state court postconviction counsel. As set forth in this Court's Order dated August 29, 2007, the PCD was appointed by the Supreme Court of Tennessee to represent Mr. Harbison in any further state court proceedings arising out of his conviction and death sentence in this case. As such, only the Supreme Court of Tennessee may remove, relieve, or discharge the PCD from the duty to

represent Mr. Harbison in these proceedings. Accordingly, it is therefore ORDERED, ADJUDGED and DECREED that Mr. Harbison's "Motion to Restitute Pro Se Filings Back Upon Courts Docket" is DENIED.

Entered this the 19th day of October, 2007.


JON KERRY BLACKWOOD, Judge
Sitting By Designation of Supreme Court

CERTIFICATE OF SERVICE

I, Edna Camp, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record this the 2nd day of _____, 2007.

CLERK

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: September 25, 2007

ORDER

On July 17, 2006, this Court set an execution date of October 11, 2006, for Edward Jerome Harbison. On August 15, 2006, the Court re-set the execution date to February 22, 2007. On February 1, 2007, the Governor of Tennessee granted an executive reprieve to Harbison to allow the Commissioner of Correction to review the manner in which death sentences are administered in Tennessee and to provide new protocols and related written procedures for administering a sentence of death. Upon completion of the Commissioner's review and expiration of the reprieve, the Court re-set Harbison's execution for September 26, 2007.

On September 19, 2007, the United States District Court for the Middle District of Tennessee held that the Tennessee Department of Correction's "Execution Procedures for Lethal Injection" violate the Eighth and Fourteenth Amendments to the Constitution of the United States and enjoined the Warden of the Riverbend Maximum Security Institution from executing Edward Jerome Harbison under the current procedures for lethal injection. The Federal District Court, however, refused to grant a stay. See Harbison v. Little, Case No. 3:06-1206 (M.D. Tenn. 2007).

On September 24, 2007, the State of Tennessee filed a "Motion to Vacate Order Setting Execution Date" requesting that this Court vacate its order setting Harbison's execution date for September 26, 2007. The motion alleged that the Commissioner of Correction had represented to the Office of the Attorney General that additional time is needed to determine what course of action the Department will take in response to the injunction. Furthermore, the Motion stated that "the Department will not be in a position to go forward with the execution of Mr. Harbison on September 26, 2007."

On September 24, 2007, Donald Dawson of the Post-Conviction Defender's Office, who is representing Harbison, filed a letter in response to the State's Motion, in which he stated that Harbison has no objection to the State's Motion.

Upon due consideration of the Motion and the letter in response, the Motion is GRANTED. The Order of May 22, 2007, setting the execution date for September 26, 2007, is hereby VACATED.

It is hereby ORDERED, ADJUDGED and DECREED that the execution date shall be re-set and that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute

Exhibit A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: September 25, 2007

WILLIAM C. KOCH, JR., J., dissenting.

The State of Tennessee has requested this Court to vacate its May 22, 2007 order setting Edward Jerome Harbison's execution for September 26, 2007. As grounds for this motion, the State asserts that the Commissioner of Correction has stated that "additional time is needed to determine what course of action the Department will take in response to the injunction in *Harbison v. Little*" and that because of that injunction, "the Department will not be in a position to go forward with the execution of Mr. Harbison on September 26, 2007." Mr. Harbison, through his attorneys, has responded that he has no objection to the State's motion.

The Court has carefully considered the State's motion and has decided to delay Mr. Harbison's execution for a third time. I respectfully disagree with the Court's decision because I have concluded that the State has presented an insufficient factual and legal basis to support its request.

The General Assembly of Tennessee foresaw this precise circumstance in 1998¹ and again in 2000² when it determined that if execution by lethal injection was found to be unconstitutional for any reason, execution by electrocution would remain in full force and effect. Thus, Tenn. Code Ann. § 40-23-114(d) (2006) states: "In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution." The import of this sentence is unavoidable. If execution by lethal injection is declared unconstitutional, the execution may proceed by electrocution. The United States District Court for the Middle District of Tennessee recognized this conclusion when it declined to grant a stay of execution in *Harbison v. Little*.

The State is not without remedy in this case. Notwithstanding Tenn. Code Ann. § 40-23-114(d), the Governor of Tennessee may grant a temporary reprieve to allow the State time to

¹See Act of Apr. 29, 1998, ch. 982 § 4, 1998 Tenn. Pub. Acts 757.

²See Act of Mar. 29, 2000, ch. 614, § 5, 2000 Tenn. Pub. Acts 1854.

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determine the course of action it should take. Tenn. Const. art. III, § 6; Tenn. Code Ann. § 40-27-101 (2006). However, we judges must adhere to the otherwise valid statutes passed by the General Assembly. While postponing the execution date might be appropriate to enable the parties to address the application of Tenn. Code Ann. § 40-23-114(d), not requiring the parties to address Tenn. Code Ann. § 40-23-114(d)'s application to this case does a disservice to the General Assembly.

WILLIAM C. KOCH, JR., J.